

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

JERRY VanDIVER,

Plaintiff,

v.

Case Number 08-10483-BC
Honorable Thomas L. Ludington

KENNETH A. ROMANOWSKI, et al.,

Defendants.

**ORDER GRANTING IN PART AND DENYING IN PART MOTION FOR EXTENSION
OF TIME TO FILE OBJECTIONS, OVERRULING OBJECTIONS, ADOPTING THE
MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION, GRANTING THE
MOTION TO REVOKE PLAINTIFF'S IFP STATUS AND DISMISSING THE
COMPLAINT**

This matter is before the Court on a report and recommendation issued by Magistrate Judge Mona K. Majzoubhad on June 25, 2008. The magistrate judge recommended that Plaintiff's *in forma pauperis* ("IFP") status be revoked and Plaintiff's complaint be dismissed. The magistrate judge concluded that under 28 U.S.C. § 1915(g), Plaintiff is not eligible for IFP status because Plaintiff has "on three or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted," and Plaintiff is not in "imminent danger of serious physical injury."

On February 1, 2008, Plaintiff filed a complaint against the Defendants, alleging violations of his civil rights under 28 U.S.C. § 1983, and submitted an application to proceed with IFP status. On February 4, 2008, the Court granted Plaintiff's application.

On April 10, 2008, Defendants filed a motion for revocation of the order granting the Plaintiff's application. The Defendants asserted that Plaintiff was not eligible to proceed with IFP

status because Plaintiff has had three or more actions dismissed on the grounds specified in 28 U.S.C. § 1915(g). On May 7, 2008, the Court referred the issue to United States Magistrate Judge Mona K. Majzoubhad for determination, and on June 13, 2008, Plaintiff filed his response.

On June 25, 2008, Magistrate Judge Majzoubhad issued her report and recommendation. On July 16, 2008, after the ten-day period for timely objections had passed, Plaintiff filed a motion to extend the time to file objections, along with objections. Plaintiff asserted he did not receive the report and recommendation through the prison mail system until July 8, 2008.

As an initial matter, the Court **ORDERS** the motion to extend time to file objections [dkt #26] is **GRANTED IN PART**, so that the Court may consider the objections filed by Plaintiff on July 16, 2008, and **DENIED IN PART**, to the extent it seeks additional time.

As to Plaintiff's objections, a district court reviews *de novo* the parts of a magistrate judge's report and recommendation to which Plaintiff objects. See 28 U.S.C. § 636(b)(1). The district "court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate" judge. Id. Plaintiff raises two objections.

First, Plaintiff disagrees with the magistrate judge's characterization of his previous dismissals as falling under 28 U.S.C. § 1915(g). The Plaintiff asserts his prior actions were not dismissed as frivolous, but for failure to state a claim. Plaintiff's distinction makes no difference because both are covered by the statute. See 28 U.S.C. § 1915(g). In addition, another court in the Eastern District has previously found that Plaintiff is not eligible for IFP status due to his prior dismissals. See Vandiver v. Terrill, No. 08-10487 (E.D. Mich. Apr. 30, 2008) (Steeh, J.).

Second, Plaintiff disagrees with the magistrate judge's finding that Plaintiff is not in "imminent danger of serious physical injury" as required under 28 U.S.C. § 1915(g). The Court

does not find Plaintiff's argument persuasive. Plaintiff's allegations, including his allegation that a prison worker "planted" a razor blade in his cell, do not suggest that he is in "imminent danger of serious physical injury."

Accordingly, the Court **ORDERS** Plaintiff's objections [dkt #25] **OVERRULED**, the report and recommendation of the magistrate judge [dkt #24] **ADOPTED** in its entirety, the motion to revoke the order granting Plaintiff's application to proceed without prepayment of fees [dkt #18] **GRANTED**, and the order granting Plaintiff's application to proceed without prepayment of fees [dkt #3] **REVOKED**.

It is further ordered that the complaint is **DISMISSED WITHOUT PREJUDICE**.

s/Thomas L. Ludington
THOMAS L. LUDINGTON
United States District Judge

Dated: August 26, 2008

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing order was served upon each attorney or party of record herein by electronic means or first class U.S. mail on August 26, 2008.

s/Tracy A. Jacobs
TRACY A. JACOBS